



Athens, 8th April 2020

FAQs re Force Majeure in connection with the COVID-19 outbreak

As the pandemic continues to spread and affect the Greek economy, the Hellenic Ministry of Finance has been announcing urgent packages of measures through Acts of Legislative Content ("ACL") in order to tackle the consequences of the coronavirus - COVID 19 outbreak.

The option of a commercial entity to invoke a force majeure clause under Greek law is summarized in the below FAQs.

Has the operation of private businesses been disrupted?

Among the preventive measures to tackle the spread of the Coronavirus nationwide, Greek government required that a series of private enterprises suspend their operation. In particular, all commercial stores were ordered on 18.03.2020 to shut down with the exception of supermarkets, pharmacies, food shops, bakeries, pet shops, banks and gas stations (with entry checks preventing overcrowding). As a result, there is a deep and growing concern that the pandemic shall have a grave impact on commercial transactions across a range of sectors.

How is Force Majeure viewed under Greek law?

The notion of force majeure has been developed and recognized by Greek legal theory and jurisprudence. In fact, every unintended occurrence or event that occurs out of the limits of intent or negligence is considered to be an event caused by luck, or force majeure and does not incur liability. In this respect, force majeure is interpreted by Greek law as any unforeseeable circumstance or accidental event that renders it objectively impossible for a party to meet certain contractual obligations, assessed on the facts of each particular case, which were unforeseen and which the party was unable to avoid, even taking all careful and prudent measures. Events deemed to fall within this category include natural disasters such as floods and earthquakes, as well as governmental interventions imposing compulsory measures.

Can a Force Majeure occurrence be contractually excluded?

The contracting parties may have agreed to extend their liability for damage or loss by force majeure, under the principle of the contractual freedom (Art. 5 of the Greek Constitution). This extension should be, nevertheless, exercised under the light of good faith, good morals and non-abusive exercise of rights (Arts. 178, 179 and 281 of the Civil Code).

What are the consequences of a force majeure event?

In case of force majeure, contractual parties cannot be held liable for breaches of contract that resulted from events of force majeure or luck (Arts. 336, 342 and 380 of the Civil Code).

When it comes to bilateral agreements, the inability of a contracting party not at fault to perform due to force majeure may hence result to this party being released from the obligation to perform (Art. 380 of the Civil Code).

More particularly, in case of sales contracts, unless otherwise agreed, the buyer bears under Greek law the risk for the random destruction or deterioration of goods at the time of delivery (Art. 522 of the Civil Code). As a result, the buyer is obliged to pay if the goods are lost or damaged during delivery.

Is there a rebus sic standibus clause?

Additionally, Greek law recognizes the general concept of rebus sic standibus, i.e. of unexpected changes in circumstances (Art. 388 of the Civil Code). In particular, if the contracting parties proceed to an agreement based on certain circumstances that changed greatly following unforeseeable and unpredictable events, rendering the fulfilment by a party of its obligations overly and unduly burdensome, that party may request the court to adjust the obligations accordingly or to terminate the contract in whole or in part.

Does COVID-19 qualify as Force Majeure?

In view of the above, the COVID-19 pandemic does appear to fall within the ambit of force majeure, since it is an event which could not have been foreseen or avoided – not only by the average counterparty, but also by the most prudent one. This interpretation could be further supported by the ACLs enacted by the Greek government to suspend business operations and freeze the obligations of individuals and businesses towards tax, social security and other authorities.

The above interpretation is further reinforced by the fact that the most recent legislation uses the particular term “*force majeure*”. Whilst the use of this phrase would not in itself bind a court, there can be reasonably assumed that a Greek court would put considerable weight on the legislator's wording.

In any case, the negation or acknowledgment of a force majeure event shall be definitely ruled by Greek courts, following an assessment of the subject matter and circumstances of each particular case.

How can a business entity mitigate contractual risk?

Any commercial entity wishing to adapt to the COVID-19 rapidly changing environment, would be well advised to proceed - either proactively or reactively - with the following legal steps:

- Due diligence of commercial agreements in order to assess the possibility to protect the parties' interests, with specific reference to force majeure events;
- Addition of clauses with explicit reference to infectious diseases or epidemics to commercial agreements;
- Employment of enhanced due diligence requirements and assessment of the impact of the COVID-19 outbreak on companies', suppliers' and their customers' business operations;

- In commercial agreements with cross-border character, forum selection clauses should be negotiated with caution; this way enterprises may avoid that the dispute is resolved under a common law legal system, where uncertainty prevails.

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